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No.: 08-8

Supreme Court, U.S.
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In the

Supreme Court of the United States

ROBERT R. WATSON,

Petitioner Pro-Se,

-against-

MICHAEL B. MUKASEY,

Respondent.

REPLY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether respondent's brief is moot based on the fact that the question presented is inapplicable and has no relevance to the facts and law in instant case.

LIST OF PARTIES

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2a-4a) is not published in the Federal Register but is reprinted at 255 Fed. Appx. 920. The decisions of the Board of Immigration Appeals (Pet. App. 26a-29a) and the Immigration Judge (Pet. App. 14a-17a) are unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 29, 2007. A Petition for rehearing was denied on January 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

On or about July 1st, 1986, I entered the U.S.A. at Mc. Allen Texas, without inspection. I was detained and released by the Border Patrol. I retained the service of an attorney Mr. Pena. It was rumored that if you paid him, he had an inside connection and would fix whatever needs fixing.

I departed to New York shortly thereafter. I stayed at my initial address for a very brief period.

My change of address was given to Mr. Pena but not to the INS, at this time I was not aware that I had an obligation to do so. There was no information in the OSC to this effect. Knowing that Mr. Pena could contact me if necessary and I had applied and received an approved Labor Certification I naively assumed that Mr. Pena was as good as rumored. Unfortunately this proved to be wishful thinking, Mr. Pena was disbarred shortly after I paid him and apparently he did not inform the Court of my change of address. The notice of hearing was sent to my previous address and returned to the Court as undeliverable, the same with the deportation order. The notices sent to Mr. Pena were also returned to the Court, similarly notated. I was ordered deported *in absentia* because being ignorant of the hearing notice, I could not attend. Even though I had possible relief in the form of an application for Labor Certification.

I have been trying to reopen and rescind deportation proceedings based on the irrefutable,

incontrovertible fact that I did not receive the notice of hearing, that I was not notified in the OSC *re* the change of address notification and thus had reasonable cause for my absence. I did not receive the hearing notice and my motions to rescind sought rescission based on the statute at 8 U.S.C. § 1229a (b)(5)(C)(ii). My motions are being denied despite the fact that these results are contrary to the plain language of the statute, which applies to all aliens who have not received the notice of hearing.

CONSTITUTIONAL REGULATIONS AND STATUTES

Former 8 U.S.C. section 1252 B(c)(3) of the Act: An in absentia deportation order may be rescinded:

> If the alien demonstrates that the required notice was not received or the alien was in Federal or State custody and that the failure to appear was not the aliens fault. A motion to reopen can be filed at any time.

8 C.F.R. § 1003.23 (b)(4)
(iii) Order entered in absentia in deportation or exclusion proceeding (A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

> at any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in Federal or State custody and the failure to appear was through no fault of the alien.

(D) The time and numerical limitations set forth in paragraph (b)1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

ARGUMENT

There are certain facts of instant case which are irrefutable and indisputable and they include (1) The Notice of Hearing was not received. (2) The Order to Show Cause did not advise me of my obligation to notify the Court of any address change and the consequences of not doing so. (3) The attorney of record was disbarred and the Court and the Immigration Judge were aware of this. (4) I am the beneficiary of an approved I-130 and "grandfathered" under I.N.A. § 245 (i). (5) My Motions to reopen sought rescission of the in absentia deportation order, based on the fact that the N.O.H. was not received.

Contrary to respondent's claim Resp. brf. 10. My motions to reopen and rescind the in absentia deportation order were not untimely Pet. App. 29a. They were subject to the Board's broad discretion. The discretion of the Board may be broad but it is not unfettered. Its discretion has to be exercised based on proven facts, applicable BIA and Circuit Courts precedents and the relevant Statutes. If its discretion was unfettered no BIA discretionary decisions would be subject to Judicial Review.

The evidence supporting my claim of non-receipt of the hearing notice is overwhelming. The IJ M & O Pet. App. 14a paragraph 4, states that the Notice of Hearing was returned by the United States Postal Service as undeliverable with the notation "moved not forwardable". It is a physical impossibility that the notice could be received by the

intended recipient and returned by the U.S.P.S. simultaneously. These two scenarios are polar opposite, they are mutually exclusive and cannot, absolutely cannot occur together. The Postal Service classified the notice as being undeliverable, meaning in plain English, that it could not be delivered.

Respondent's brief via the question presented and the legal argument within disingenuously attempts to reclassify my motions as seeking reopening for the purpose of adjustment of status. While this may be necessary to bolster respondent's arguments that my motions were untimely, Resp. Brf. 15, 16, and make relevant the question presented Resp. Brf. (i), the "entitlement to adjustment" argument Resp. Brf. 16 and "the 14.5 yrs time span". This effort is unavailing and futile when faced with the proven facts of instant case.

My motions to reopen categorically sought rescission due to the irrefutable fact that I did not receive the N.O.H. Respondent's brief proves this. Respondent's brief states that review was sought of the Board's denial of motions 3, 4 and 5 Resp. brf. 9. Motion No. 3 was seeking reconsideration of a denial of a motion to "Rescind, Reconsider and Reopen" filed August 2005, Resp. brf. 7. Motion 4 filed July 2006 titled "Motion to Reopen, Rescind and Change Venue" Resp. brf. 8. Motion No. 5 was one seeking reconsideration of Motion No. 4 decision.

Thus it was abundantly clear that my motions sought reopening so that the deportation order could

be rescinded and not adjustment of status as respondent is trying to portray.

Respondent's "entitlement to adjustment" arguments are without merit. The Statute at 8 U.S.C. 1252 B (c) (3) authorizes rescission once the alien demonstrated that the N.O.H. was not received. The petition for adjustment of status can only be adjudicated subsequent to rescission of the deportation order and not the other way around as respondent argues. Resp. brf. (i).

In my petition for writ of certiorari I should have argued that reopening and rescission was authorized by the statute at former 8 U.S.C.S. 1252 B(c)(3) and not 8 U.S.C.S. 1229 (a)(b)(5)(C)(ii) as the respondent correctly noted, Resp. brf. 16. This error should not be fatal to my petition as both statutes permit rescission once the alien demonstrates lack of receipt of the N.O.H.

As a matter of fact this correction by the respondent only strengthened my case. The statute at 8 U.S.C.S. 1252 B(c)(3) is plain and unambiguous, there are no riders attached, rescission is authorized once lack of receipt is established, unlike 8 U.S.C.S. 1229 a(b)(5)(C)(ii), which reads in part "If the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1 of this title" Pet. App. 8.

The statute authorizes rescission once non-receipt of the N.O.H. is established. The BIA was compelled to reopen and rescind my in absentia

deportation order. This is a non-discretionary decision. See precedent decision, *Mirales-Valdez v. Ashcroft*, 349 F.3d 213, 217 (5th Cir. 2003), holding that "whether an applicant satisfies the requirement of a given statute is a non-discretionary decision because it involves straightforward statutory interpretation and application of law to fact".

Instant case is under the purview of the Fifth Circuit and as such is subject to its precedent decisions. See BIA precedent decision, *Anselmo*, 20 I&N Dec. 25 (BIA 1989); *Abdulai v. INS* 239 F.3d 542 (3rd Cir. 2001) Pet. App. 18, 19.

Supreme Court Precedent also demands rescission of this deportation order. "If the intent of Congress is clear, that this is the end of the matter, for the Court, as well as the Agency must give effect to the unambiguously expressed intent of Congress". *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S.837, 842-43 (1984). This is particularly compelling as the Supreme Court is the final arbiter of all things legal in the land.

The 5th Cir. Panel relied on Estrada Trochez to support its decision to deny my petition for review. I argued that Estrada Trochez does not control, is inapposite and inapplicable to instant case. Pet. App. 22, 23. I also argued that this legal premise was already adjudicated and rejected by the BIA. 23 I&N Dec. 181 (BIA 2001) (Matter of In re G-Y-R-respondent). Respondent did not address these issues. This lack of response spoke volumes considering that my arguments rebutted and

invalidated the foundation of the 5th Circuit panel's decision.

Respondent did not address all questions presented, 4-6, Pet. App. (i), and they should be deemed waived as per Supreme Court rule 15.2 which reads in part "Any objection to consideration of a question presented based on what occurred in the proceeding below, if the objection does not go to jurisdiction may be deemed waived unless called to the Court's attention in the brief in opposition".

Respondent stated that the Immigration Act of 1990 which prescribe "the change of address warning" enactment was post my deportation proceeding. Resp. brf. 12. I will concede that point, respondent also stated "Here, the Board identified several reasons for denying reopening, including its determination that petitioner (1) failed to establish that the hearing notice was not properly sent to his last known address". Resp. brf. 11. The clause "notice sent to last known address satisfied notice requirement" was also added to the INA post my deportation proceeding thus inapplicable according to respondent.

This fact confirms my claim of improper notice. The I.J. conclusion of proper notice is invalid. Pet. App. 16a paragraph 7. The I.J. concluded that the hearing notice was properly served because said notice was mailed to the attorney of record. The I.J. made his conclusion in paragraph seven of said M and O, even though in an earlier paragraph (three) he noted that the attorney of record was disbarred

and even referred to official document verifying disbarment. Pet. App. 10a, 13a.

Respondent seems to be arguing that because 5th Circuit Panel decision was unpublished and unprecedential it did not necessarily have to comport with the law. Rep.brf.13. I beg to differ, all legal proceedings, even aliens in deportation proceedings are entitled to the right to fairness and due process embedded in the Fifth Amendment of the Constitution. See *Bridges v. Wixon*, 326 U.S. 145 (1945) which holds that the constitution applies to non citizen in deportation proceedings or in INS custody.

Respondent claims that this decision does not conflict with any other Court of Appeals decision. Resp.brf.14. This is patently false. After examining respondents logics supporting this statement, it becomes readily apparent that the possibility that any decision would be in conflict with another is extremely remote. Respondent emphasizes the difference in the minutae between cases while ignoring the obvious similarity in the specific and relevant principle present in the cases sited.

In Lahmidi v. INS Rep.brf.13, even though the 1990 act was post my proceeding, the basic principle involved is identical "for an alien who had not received notice and had not been advised to update his address "Rep.brf.13, and would still be relevant.

Re in Sabir, respondent emphasize that fact that I did not tamper with my mailbox and did not

provide an address while ignoring the core issue involved. In an effort to highlight the obvious similarity with Sabir and demonstrate the fallacy of respondent argument I will include relevant facts present in instant case in parenthesis.

"Although I.J. properly entered initial in absentia order of removal *[Deportation]* based on attempted service under 8 U.S.C.S. § 1229(i) *[U.S.C. 1252(b)]*. IJ should of have granted alien's motion to reopen, under 8 U.S.C. § 1229a(b)(5)[*8 U.S.C. § 1252B(c)(3)*] in face of conclusive proof that he did not receive note [*Pet.App. 15a paragraph 4*] and that there were not bases in the record to show that the alien thwarted delivery [*lack of advisal re-address change notification in O.S.C. Pet.App.5a-9a*]

As in Chowdry the BIA in several decisions incorrectly and unlawfully denied reopening claiming that they were time and numbered barred. Pet.App.26a, 27a. The pertinent issue ignored by respondent is that the 7th and 9th Circuit agreed that "the INS should not deny reopening of an in absentia deportation order where the denial leads to the unconscionable result of deporting an individual eligible for relief from deportation." See approved I-130 Pet. App. 18a.

Finally respondent claims that the 5th Circuit panel's decision is not in conflict with *Joshua v. Ashcroft*, 389F.3d 732 (7th Cir. 2004) Res Brief. 14, 15. This is particularly egregious. A decision whether to grant or deny a motion to reopen that seeks rescission of an in absentia deportation order

based on claimed lack of receipt of the N.O.H. pursuant to the statute at *8 U.S.C. § 1252 B(c)(3)* can only be legally and lawfully decided by first determining whether or not said N.O.H was received.

My motions undeniably sought reopening so as to rescind the in absentia deportation order. My motions were based on proven non-receipt of the NOH. This is identical to the issue present in Joshua v. Ashcroft where the court opined "*where issue is not notice but receipt,* because statute allows alien ordered deported, removed in absentia proceedings to re-open proceedings *if he did not receive notice* (emphasis mine) even if notice that was sent, whether or not it was received satisfied statutory and constitutional requirement, intended recipient affidavit of non-receipt is evidence. Multiple affidavits were submitted averring to non-receipt Pet.App. 16a,42a.

Additionally the 7th Cir. Court of Appeals also observed "that even if notice is properly served in accordance with the statute, the key issue in deciding whether to reopen proceedings after an entry of an in absentia order is "*whether notice was received*".

Respondent also stated that "There was no claim before the Court of Appeals...The evidence that petitioner submitted" Resp. brf. 15. This statement has no basis in the facts of the case. See pet. App. 15-16. Respondent has totally ignored the issue of non-receipt of the N.O.H. This is perplexing,

considering that the decision to grant or deny the petition for the writ of certiorari rest on this seminal issue.

The statute at 8 U.S.C. 1252 B(c)(3) authorizes rescission once non-receipt of the N.O.H. is demonstrated. The regulations at 8 C.F.R. 1003.23 (b)(4)(iii) mirror the statute. BIA precedent Matter of Cruz-Garcia Pet. App. 8 and Matter of Mancera pet. App. 37a same.

This proven non-receipt seems to be a panacea for all alleged defect argued in respondent brief, defacto rendering moot the entire brief.

Proven lack of receipt nullifies the timelines issue as the motion to reopen can be filed at anytime. The 14 yrs time spent on which the BIA and respondent places such great emphasis is rendered irrelevant. Resp. brf. 6, 8, 11, 14, 15.

See Court of Appeal precedent decision which holds that "No Courts or Court Appeal have placed any limitations on the time between the alien becomes aware of the in absentia deportation order and the time the motion to reopen is filed. As the statute states the motion to reopen can be "filed at anytime"(citation omitted). In Matter of Mancera deportation proceeding was reopened after 10 yrs. See also Court of Appeal precedent decision holding that "Decisions cannot be affirmed based in irrelevant issues". (citation omitted).

Proven lack of receipt authorizes rescission and compels reopening. The fact that non-receipt was established satisfied the statute at 8 U.S.C. 1252 B(c)(3) and the BIA was compelled to reopen proceedings. This was no longer a discretionary decision.

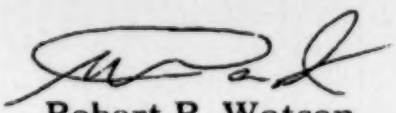
The fact that rescission was required as per the statute voided and made irrelevant the citation to Cruz-Garcia Res. brf. 16. One the order is rescinded, there is no longer "a final administrative order of deportation".

Finally, proven non-receipt of the NOH demonstrates once and for all the illegality of the 5th Cir. Panel's decision, reads in part "Watson has not shown any error... reasonable cause for failure to appear. Pet. App. 4a. See BIA precedent Matter of Heim, 19 I&N Dec. 641 (BIA 1988) which holds that "Motion to reopen shall be granted where "reasonable cause" is present to explain failure to appear; "reasonable cause" can include failure to receive notice. See also Urbina-Osejo v. INS (9th Cir. 1997)

This 5th Cir. Panel's decision effectively reads 8 .S.C. 1252B(c)(3) out of the I.N.A.

CONCLUSION

Based on the irrefutable, indisputable and uncontested facts, the relevant BIA, 5th Circuit and Supreme Court precedents and applicable statutes, the petition for writ of certiorari and the relief it seeks should be granted.



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